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Robert R. Corbin

May 16, 1984

Mr. Joe Anderson, Deputy Director  
Arizona Department of Administration  
1700 West Washington, Room 800  
Phoenix, Arizona 85007

I84-070 (R84-039)

Dear Mr. Anderson:

This letter is in response to your inquiry concerning the status of employees who filled positions in state service known as "executive service positions" pursuant to former A.R.S. § 41-771.01 which was repealed in 1983 by Ch. 98, § 158, Laws 1983, 1st Reg.Sess. A.R.S. § 41-771.01, enacted in 1981, established the Arizona executive service which consisted "of all positions within the state service at grade twenty-three or above which are determined by the Personnel Administration Division to meet the definition of an executive position." A.R.S. § 41-771.01.A.1. Employees appointed to the executive service from state service were accorded these rights:

1. An executive service employee who did not successfully complete his probation period was accorded reduction in force rights as established by A.R.S. § 41-785 (A.R.S. § 41-771.01.A.5.b);
2. On successful completion of the probationary period, an executive service employee was accorded appeal rights as established by A.R.S. § 41-785 (A.R.S. § 41-771.01.A.5.c);
3. An employee appointed to the executive service from state service who left the executive service in good standing was accorded reinstatement rights in the state service as established by the Personnel Board rules after completion of two years of employment in the executive service (A.R.S. § 41-771.01.A.6);

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4. An employee who was dismissed from executive service had the right to request an investigation into the causes for the action taken. (A.R.S. § 41-771.01A.7).<sup>1/</sup>

In 1983, the legislature repealed A.R.S. § 41-771.01. In its place, the legislature provided for certain positions which were exempted from merit system coverage. Specifically, A.R.S. § 41-771 was amended to exempt from merit system coverage the following:

Top level positions in a department or agency which determine and publicly advocate substantive program policy. This includes those persons engaged in the direction of line operations if they report directly to the director or deputy director of the agency and in large multi-program agencies those persons who report directly to the head of a primary component of the department or agency.

A.R.S. § 41-771.B.1; Ch. 98, § 157, Laws 1983, 1st Reg.Sess. ("Section 157").

We understand that many of the positions which were executive service positions under the former statute would, otherwise, fall within the definition of exempt positions as outlined by the 1983 amendments.<sup>2/</sup> However, the legislature included a "grandfather clause" in this legislation which rendered Section 157 inapplicable to individuals who occupied protected positions prior to the 1983 amendments. In particular, Ch. 98, § 238, Laws 1983, 1st Reg.Sess. ("Section 238"), provided, in pertinent part, as follows:

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1. This investigation is to be conducted by the "executive service advisory committee" which may delegate this responsibility to the assistant director for personnel.

2. Compare former A.R.S. § 41-771.01.A. Which defines "executive" as "a high administrative and policy influencing position in which the incumbent's primary responsibility is the managing of a major function or the rendering of management advice to top-level administrative authority" with A.R.S. § 41-771 as quoted above.

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The provisions of § 157 of the act shall not apply to any person employed prior to the effective date of this act unless the person was exempt from the provisions of Title 41, Ch. 4, Arts. V and VI, Arizona Revised Statutes, prior to the effective date of this act.

Those persons occupying executive service positions pursuant to the former legislation were subject to some, but not all, of the provisions of Title 41, Ch. 4, Arts. V and VI. For instance, an executive service employee was afforded reduction in force rights and appeal rights as established by A.R.S. § 41-785. Thus, the executive service personnel were not exempt from the pertinent statutes and the grandfather clause imposed by Section 238 applies to those individuals. Therefore, A.R.S. § 41-771, as amended, does not apply to those employees who were in the executive service under former A.R.S. § 41-771.01, unless the employee opts to waive his rights and enter exempt service.

If the employee chooses not to become an exempt employee, we believe that Section 238 clearly contemplates that the executive service employee retain the rights and privileges afforded to him under the former executive service plan, notwithstanding the repeal of the executive service legislation. Such an employee, therefore, retains appeal rights, reduction in force rights, and reinstatement privileges outlined by former A.R.S. § 41-771.01.

Thus, in answer to the questions raised in your letter, employees who are employed in positions that were formerly executive service positions have the same status in those positions as in the former executive service. Of course, nothing prohibits these employees from being offered, where applicable, the opportunity to waive their rights under former A.R.S. § 41-771.01 and serving as an exempt employee pursuant to A.R.S. § 41-771. Only those employees who did not successfully complete their probation should be accorded the reduction in force rights accorded through the former executive service legislation. See former A.R.S. § 41-771.01.A.5.b.

Sincerely,

*Bob Corbin*

BOB CORBIN  
Attorney General